ANATOMY OF A MISCARRIAGE OF JUSTICE:

THE WRONGFUL CONVICTION OF PETER J. ROSE

SUSAN RUTBERG*

INTRODUCTION

Over the last fifteen years in the United States, one hundred and eighty-three people have been exonerated on the basis of new evidence resulting from DNA testing.[1] This fact provides irrefutable scientific proof that the safeguards American jurisprudence has put in place to guarantee equal protection and due process of law to those accused of crime are insufficient to prevent innocent people from wrongful conviction. Wrongful convictions are neither isolated nor rare events. This realization has already been a major factor in improving the operation of the American criminal justice system. In depth

* Susan Rutberg is Professor of Law and Director of the Criminal Litigation Clinic at Golden Gate University School of Law in San Francisco. From 2001 to 2005, Professor Rutberg directed the school's Innocence Project, a branch office of the Northern California Innocence Project at Santa Clara. She and Attorney Janice Brickley and a team of students won the release and exoneration of Peter J. Rose in 2004-2005. For her work with the Golden Gate University Innocence Project, her thoughts on this article, her superb legal skills, and her friendship, I would like to thank Janice Brickley. Thank you also to the GGU law students who worked on the Rose case: Marilyn Underwood, Silky Sahnan, Emily Vena, Rodrigo Aberin, George Derieg, and Dan Taylor. And last, but certainly not least, thank you to research assistants Jason Burns and Whit Griffinger.

[1] The Innocence Project, http://www.innocenceproject.org (last visited Aug. 17, 2006).

analysis of each of the wrongful convictions brought to light by post-conviction DNA testing, provides us with data which can be used to remedy the problems which led to the wrongful convictions in the first place.

Although occasionally a wrongfully convicted person is able to prove his innocence through other types of new evidence, it is the DNA exonerations, based on indisputable scientific proof of innocence, which cast the brightest light on the shortcomings of the criminal justice system. These cases provide us with the opportunity to conduct a post-mortem investigation and discover all the factors that contributed to the wrongful conviction. Working backwards from the known fact that an innocent person was found guilty, we can analyze what went wrong and propose remedies that will improve the way we operate our criminal justice system. By creating a more fair system and protecting innocent people in the future, we can restore public trust in the law.

The original Innocence Project at the Benjamin N. Cardozo School of Law began as a non-profit legal clinic, created by Barry Scheck and Peter Neufeld in 1992.[2] Students earned law school credit for investigating prisoners' claims of factual innocence under the supervision of professors/attorneys and clinic staff. The New York project limits its cases to those where post-conviction DNA testing of evidence may yield conclusive proof of innocence. The demand for post-conviction investigation into claims of wrongful conviction is enormous. The Innocence Project was organized to meet this need. Almost fifteen years later, the Innocence Network, a group of law schools, journalism schools, and public defender offices across the country, now assist prisoners nationwide in trying to prove their innocence.[3] Network members also consult with legislators and law enforcement officials on the state, local, and federal level, conduct research and training, produce works of scholarship, and propose a wide range of remedies to prevent wrongful convictions while continuing the work to free innocent inmates.[4] The Innocence Network's credo is laudable: the prospect of innocents languishing in jail or, worse, being put to death for crimes that they did not commit should be intolerable to every

[2] *Id.*
[3] *Id.*
[4] *Id.*

American, regardless of race, politics, sex, origin, creed, or, most importantly, regardless of the individual's role within the criminal justice system.[5]

The vast majority of the potential clients who write to Innocence Projects are poor and have used up all of the legal avenues for relief.[6] Their trials are over; their appeals have been denied; there is no place for them to go for free lawyers to continue their fight for freedom. Students put prospective Innocence Project clients through an extensive screening process to determine whether or not DNA testing or other new evidence could prove their claims of innocence. Each Innocence Project across the country has a backlog of cases currently awaiting evaluation.[7]

Golden Gate University School of Law was a part of this Network from 2001 to 2005 as a branch office of the Northern California Innocence Project, based at Santa Clara University. Although we no longer represent individual defendants, we continue to work with the Innocence Network on law reform issues. Through a seminar, *Wrongful Convictions: Causes and Remedies*, our students study the factors that lead to the incarceration of the innocent and actively engage in law reform projects designed to address these problems.[8]

This Article examines one case in which students and lawyers from Golden Gate University's Innocence Project won the exoneration of Peter J. Rose, a man who served nearly ten years of a twenty-seven year State Prison sentence for the rape and kidnap of a child before DNA proved his innocence.[9] The analysis of this case focuses on how the conduct of two police detectives, the prosecutor and the defense attorney contributed to this miscarriage of justice.

---

[5] *See* BARRY SCHECK, PETER NEUFELD, JIM DWYER, ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (New American Library 2003).

[6] *Id.*

[7] *Id.*

[8] *See* Wrongful Convictions Seminar, Golden Gate University School of Law, *available at* http://www.ggu.edu/courses/section.do?id=19718 (last visited Aug. 10, 2006).

[9] Lorri Ungaretti, *Releasing the Innocent, A GGU Clinic Helps Free an Innocent Man* (2004), *available at* http://www.ggu.edu/school_of_law/academic_law_programs/practical_legal_training/clinical_programs/innocence_project/attachment/PeterRoseArticle.pdf (last visited Aug. 10, 2006).

I. HOW ONE INNOCENT MAN WAS PROVEN GUILTY

A. THE CRIME

On a Tuesday morning in late November 1994, thirteen-year-old Alicia R. was walking to school in Lodi, California when a stranger hit her in the face and dragged her into an alley. The man forcibly raped her from behind and fled. Afterwards, Alicia ran into the street and flagged down a passing car, telling the driver she had been attacked and asking him to take her home. As they drove away, Alicia pointed at a man walking on the street and said: "There he is!"[10]

At the hospital where she was taken soon afterward, semen and foreign pubic hair were found on Alicia's underwear. She told her family and the police that the man was a stranger and said repeatedly that she had not seen his face.[11]

Ron White, the driver of the car who picked Alicia up was also questioned. The description White gave of the man on the street was fairly generic: a white man with long hair and a mustache, wearing a bandana on his head, a green army jacket, black sweat pants, brown boots, and gloves.[12] A composite drawing of the suspect was published in the newspaper.[13]

B. THE CREATION OF A FALSE IDENTIFICATION

In 1994, Peter J. Rose was twenty-seven years old and living in Lodi, California with his girlfriend and their two children.[14] He was acquainted with Alicia and her family because her aunt, Wendy, was a friend of Rose's girlfriend. At one time the two families lived near each other. Wendy knew Pete and did not like him. When Wendy saw the composite drawing in the newspaper, a couple of days after the crime, she called the police "tip line" and gave Rose's name. After Wendy's call, the

[10] Transcript of Trial Record at 174, 255, 266, 267, 272, 275, People v. Rose, L.P.D. 94-14431 (Cal. Dec. 20, 1994) [hereinafter "R.T."] (on file with author).

[11] *Id.*

[12] Alicia told police that White said the guy on the street had long hair and a mustache, but she had not seen the mustache herself. Transcript of Police Interview with Victim at 37-38, People v. Rose, L.P.D. 94-14431 (Cal. Dec. 20, 1994) [hereinafter "T.I."] (on file with author). Alicia (hereinafter "A"), Lodi Police Detectives Nies (hereinafter "N") and Foster (hereinafter "F").

[13] *See* R.T., *supra* note 10, at 673.

[14] *Id.* at 391-392.

police showed both Alicia and White a group of photographs. The photos, a "six-pack" of mug-shots, included a picture of Pete Rose, but neither Alicia nor White selected Rose's picture. In fact, White selected another man's photo, saying: "This guy resembles him."[15]

Despite Alicia's failure to identify Pete, and her repeated assertions that she hadn't seen the rapist's face, her Aunt Wendy kept insinuating that she thought Pete might be the man who attacked her.[16] Wendy also told Alicia that Pete's girlfriend had said he wasn't home at the time of the attack and that he was acting strange when he came home that morning. Wendy even took Alicia over to Pete's house to search for evidence. Their search failed to turn up any clothing that matched the description Alicia had given, except for a pair of black sweatpants.

On December 20, 1994, three weeks after the still-unsolved crime, two police detectives brought Alicia to a small room in the basement of the police station and subjected her to a three hour "interview."[17] During this interview, Alicia kept telling the detectives that she did not know her attacker.[18] The two detectives, both men, repeatedly accused Alicia of lying.[19] When she maintained that she was telling the truth and did not know the rapist's identity, they asked her to tell the story over and over, backwards and forwards, looking for inconsis-

---

[15] Lodi Police Dep't, Photo Line-Up Fact Sheet, 94-14431 (Nov. 30, 1994) (on file with author).

[16] R.T., *supra* note 10, at 343, 541.

[17] *See* R.T., *supra* note 10.

[18] F: "..[D]id you see this guy's face. Do you know who this was?" A: "No." T.I., *supra* note 12, at 18. A: "I don't know with who and I don't know why." F: "Yes you do." A: "No, I don't." F: "Yes you do Alicia . . . .." *Id.* at 31. N: "Why do you keep saying , 'I don't know who it was'?" A: "'Cause I don't." *Id.* at 34-38.

[19] A: "You guys think I'm lying?" F: "Yes. I do . . . ." T.I., *supra* note 12, at 9. F: "Alicia, this didn't really happen did it?" A: "Yeah, it did." F: "Who did you really have sex with that morning?" A: "I don't know." F: "Seriously?" A: "I don't know . . . . I don't know who this guy was." *Id.* at 18. A: "Do you think that I know who did this?" F: "I'm asking you to tell us what really happened." A: "I am telling you what really happened." F: "Okay, but it wasn't forced, was it?" A: "Yes, it was." F: "Alicia." A: "It was." F: "It wasn't forced was it? Who did you really get in a fight with and why did you end up behind that house?" *Id.* at 19. A: "I didn't know who it was." F: "Yes you do." A: "Well, you guys want me to say that it didn't happen?" F: "I want you to tell us the truth." A: "I am telling you the truth." *Id.* at 20-21. F: "Are you scared because of the lie that's been created here?" A: "No, 'cause I' m not telling a lie." F: "I believe you are. And, if you're gonna stick to that story, we've made arrangements to have a lie detector test for you tomorrow afternoon." *Id.* at 22-30.

tencies. One of the detectives told her to tuck her crucifix out of his sight "because I keep looking at this thirteen-year-old young lady who keeps fibbing to me while she's wearing a crucifix staring me in the face."[20] The police scorned her belief in God, asked her to swear on her grandfather's life, asked demeaning questions about her body, accused her of prostitution and gang affiliation, threatened to tell her grandfather she had been sexually active, all the while continuing to call her a liar.[21] These tactics eventually resulted in a tearful Alicia mentioning Pete Rose, saying, "My Aunt Wendy talked to his girlfriend and his girlfriend said he wasn't home that morning, and he's been acting weird ever since."[22] Even after three hours of pressured questioning, the girl was hesitant: "I don't know if it's Pete or not. I don't want to say it is or not. And then you guys keep on asking me, 'Is it Pete? Is it Pete?'"[23]

At the end of that "interview," the detectives again showed Alicia a photo spread that included Rose's picture.[24] This time she selected his photo. Rose was arrested the following day.[25]

---

[20] T.I., *supra* note 12, at 29-30. A: "So, what do you want me to do, put it in my shirt?" F: "Yeah, I do. Because it means something to me and it doesn't mean anything to you. And this, and this lie has gone on long enough and it's time that it comes to a halt and time to come to a halt Alicia right now. We've, we've been very . . . ." A: "I'm not lying." F: "We've been very nice. We've gone out of our way over and over and over, out of our way to help you in this situation. We've offered you plenty of face saving, you can walk away with this without a lot of disgrace or anything else and you're choosing to keep it goin'. For what reasons, I don't know. For what motive, I don't know."

[21] *Id.* at 23, 34-36, 27-30. F: "Did he pay you money to go back there and have sex with you?" A: "No." T.I., *supra* note 12, at 34. F: ". . . [B]ecause basically in your heart of hearts you know that this is a lie. In your heart of hearts, and yet your mind and your pride, even down to your Norteno pride, will not allow you to come up on this . . . ." *Id.* at 36.

[22] N: "Do you know who this guy was? You got an idea who this guy was?" A: "Yeah, I'm not sure though. 'Cause I don't want to say if it is or not." N: "Tell me who." A: "His name's Pete . . . . And my Aunt Wendy talked to his girlfriend and his girlfriend said he wasn't home that morning, and he's been acting weird ever since." T.I., *supra* note 12, at 62. F: "Okay, Alicia, let's cut to the chase a little bit. Was it Pete?" A: "I don't know. Seriously, I don't know." *Id.* at 62-63. F: "Is it possible? Is it possible?" A: "It could be Pete?" F: "Yeah and you don't want to identify him because you're afraid of what, if you were wrong, oh my god?" A: "I don't know. I can't say it is or not. What if it's not?" *Id.* at 64.

[23] A: "I don't know if it's Pete or not. I don't want to say it is or not . . . . And then you guys keep on asking 'Is it Pete?' I don't know." N: "You're the one that said Pete, not us." A: "I think it's Pete." T.I., *supra* note 12, at 71.

[24] *Id.* at 74-75.

[25] Claim for Wrongful Conviction, In the Matter of Peter J. Rose, Exhibit C (on file with author).

When police searched his home for corroborating evidence, they found only the black sweatpants.

The detectives' meeting with Alicia was tape-recorded.[26] The police gave the tape to the Assistant District Attorney. The prosecutor then interviewed the victim himself. Between the date of the police interview, December 20, 1994, and Alicia's testimony at the preliminary hearing several weeks later, the young girl became one hundred percent certain of her identification of Rose, and repeated her one hundred percent certainty in her testimony at trial.

C. THE CREATION OF A SECOND FALSE IDENTIFICATION

During Alicia's lengthy interrogation by the police, one of the things she told the officers was that the man she had pointed out to Ron White on November 29, 1994, as he drove her away from the crime scene, was just "somebody walkin'" and not the rapist.[27] A few days after he allegedly saw Alicia's attacker, White had looked a photo spread that included Rose's picture but did not identify Rose. In fact, at that time, White selected another man's photograph as "resembling" the person that Alicia had pointed out on the street.[28] Two and a half months later, at the February 1995 preliminary hearing, White testified that the man he saw on the street after he picked up Alicia "resembled" Peter Rose.[29] However, by the time of trial, the certainty with which White expressed his identification of Rose had increased to eighty percent.[30] Pointing to Rose in court, White said the man Alicia pointed out was either Rose or "his twin brother."[31]

What happened to cause White's complete turnaround from his initial selection of another man's photo? Between the time of his alleged sighting of the rapist and his eventual testimony at Rose's trial, White was arrested for felony possession of narcotics for sale.[32] Remarkably, White's new case was re-

---

[26] *See* T.I., *supra* note 12.

[27] T.I., *supra* note 12, at 74.

[28] R.T., *supra* note 10, at 767.

[29] Clerk's Transcript on Appeal at 80, People v. Rose, No. S.C. 058356A (Cal. Aug. 30, 1996) [hereinafter "C.T."] (on file with author).

[30] R.T., *supra* note 10, at 178-180.

[31] *Id.*

[32] Claim for Wrongful Conviction, *supra* note 25, at 7.

duced to a misdemeanor and diversion was granted.[33] Since White had two prior felony convictions, had the prosecutor chosen to pursue the felony, possession for sale, White would have faced a third strike, thus subjecting him to a possible life sentence in state prison.

Although the jury heard about White's arrest and the fact that the charge had been reduced, Rose's defense lawyer failed to effectively cross-examine White and detail the full scope of the benefits he received.[34] Moreover, the significance of Rose's lawyer's efforts to impeach White with this information was diluted because the prosecutor called another Deputy District Attorney from his office to testify that the disposition of White's new case was unrelated to his testimony in the Rose trial.[35] The jury was thus misled as to critical information regarding White's credibility.

D. SCIENTIFIC EVIDENCE

The prosecutor in Rose's case sent pubic hair and semen stains from the rape victim's clothing to a laboratory for analysis.[36] With the type of DNA testing available in 1995, DQ-Alpha, the lab was unable to develop a DNA profile from the evidence. However, the pubic hair was examined visually and serology tests were conducted on the semen sample.[37]

At trial, two San Joaquin County criminalists testified for the prosecution.[38] One said that, based on a visual examination, Peter Rose could have been the donor of the pubic hair. The other criminalist testified that the results of the serology test performed on the semen sample were "inconclusive." However, she testified that she could say with certainty that Rose was within thirty percent of the population with the same phosphoglucomutase ("PGM") status as was found in the tested material. PGM, a genetic marker similar to a person's blood type, is an enzyme found in semen that does not contain DNA.[39] The criminalist's conclusion about the pubic hair based

[33] R.T., *supra* note 10, at 186.

[34] *Id.*

[35] *Id.* at 721.

[36] *Id.* at 555.

[37] *Id.* at 567-569.

[38] *Id.* at 553, 578.

[39] The likelihood of obtaining an accurate PGM typing from a swab is directly

on visual examination should have been challenged as the product of unreliable "junk" science,[40] yet the defense attorney made no effort either to exclude the testimony or to challenge the prosecution witness's assertion during cross examination.

Even more damaging to Rose's defense was the fact the jury never heard that the blood type identified on the semen sample was not the same as Rose's blood type.[41] This piece of exculpatory information would have posed a scientific challenge to the assertion that Rose was within the thirty percent of the population that could have deposited the semen. This evidence was not elicited on either direct or cross-examination.

Because it could certainly have been characterized as potentially exculpatory under *Brady v. Maryland*,[42] the fact that Rose and Alicia have different blood types and that Rose's blood type was not found in the semen on her underwear is evidence that should have been provided to the defense in discovery. Although this crucial fact appears in the criminalist's "bench" notes regarding the blood tests, it does not appear in her report. Only the report, with its conclusion of "inconclusive" results, was turned over to defense counsel.[43]

During the prosecutor's closing argument, he emphasized the importance of the criminalist's testimony, and characterized the "scientific" testimony as evidence that supported Alicia's identification of Rose as her attacker:

> They checked the hair. And the important thing isn't so much that they can't say it was the defendant, it is that they can't say it *isn't* the defendant, the very person she says did

related to the lapse of time between intercourse and collection of the sample. PGM activity decreases rapidly when swabs are taken more than two hours after intercourse. People v. Wilson, 128 Cal. App. 3d 132, 136-37, n.3 (1982) (citing Blake & Sensabaugh, *Genetic Markers in Human Semen: A Review* 21 J. FORENSIC SCI. 784, 794-795 (1976)).

[40] The Innocence Project: Junk Science, http://innocenceproject.org/causes/junkscience.php (last visited Aug. 10, 2006).

[41] *See* R.T., *supra* note 10.

[42] Brady v. Maryland, 373 U.S. 83 (1963).

[43] At a subsequent hearing on Rose's petition for writ of habeas corpus in state court, the criminalist testified that she did not consider it significant that Rose's blood type was not present. In her opinion, the sample contained insufficient semen to give meaning to its absence. In 2004 semen was found on that same evidence, and Y-STR testing excluded Peter Rose as the donor. These test results prompted Judge Stephen Demetras to grant a petition for a writ of habeas corpus filed by the Golden Gate University Innocence Project, resulting in Rose's release from prison and his eventual exoneration. C.T., *supra* note 29.

> this to her.
> All they can say is the hair is consistent with the defendant. They can't say it is him, they can't say it isn't. They can do one blood test where they get this PGM, and they both had PGM one plus zero. [Thirty] percent of the people have PGM one plus. That means the other [seventy] percent have PGM one minus, PGM two plus and PGM two minus. They ran a test on that semen stain and it comes back one plus.
> If that semen stain were to come back one minus, two plus or two minus, then the defendant wouldn't be here today. But it didn't . . . it came back one plus. The person she says did this to her has the same blood type she has. And they don't find any other blood type in that sample.[44]

The serology testimony was simply wrong and should have been impeached during cross-examination by the information contained in the criminalist's own "bench" notes. Had the jury known that the sample contained a blood type different from Rose's, the PGM marker evidence would have been rendered irrelevant.

E. THE DEFENSE CASE

Rose maintained his innocence from the beginning, telling the judge "I don't need a[n] attorney, Judge. I'm not guilty."[45] He might have been better off without an attorney since the one appointed to represent him failed utterly to mount a persuasive defense. Among other crucial omissions, Rose's defense attorney did not file a motion to suppress Alicia's in-court identification as the product of coercive and suggestive police procedures. He also failed to use the tape of Alicia's police interrogation, in which she can be heard repeatedly telling officers she did not know who the man was, had not seen his face, and could not identify him, to impeach her testimony that Rose was the rapist.

Several consequences resulted from these failures. The jury never heard about the strong influence that coercive police questioning had on the young victim's statements. Specifically,

---

[44] R.T., *supra* note 10, at 1018-1019 (emphasis in original).

[45] Jeffrey M. Barker, *'Nightmare Over' After 10 Years in Prison DNA Testing Helped Clear Man,* THE STOCKTON REC., Nov. 4, 2004.

the jury never heard that Alicia's tentative naming of Rose came only after detectives called her a liar, implied she was a prostitute, suggested she had made the whole thing up to get attention, and insisted she take off her crucifix so she would not be lying in the presence of the Lord.

Rose's defense attorney also failed to move to exclude White's testimony as irrelevant. Alicia had told police that the man she pointed out to White was not her attacker but just "some guy."[46] The attorney could have used this statement as the basis for a motion to exclude White's testimony regarding the identity of the man he saw on the street as irrelevant. But no such motion was filed. Instead, White was permitted to testify at trial that he was eighty percent certain that Rose was the man that Alicia pointed out. The defense attorney's cross-examination of White was miserably ineffective: he failed to ask White about his prior identification of another man or to establish the morphing nature of his identification testimony regarding Rose.[47]

The theory of the case put forward by defense counsel was that another person, a man named Dooley, committed the crime.[48] This theory was based on statements that Dooley allegedly made to another man.[49] The problem with the theory was twofold: first, no evidence was presented to support it, and second, trying to prove that Dooley was the perpetrator effectively shifted the burden of proof to the defense.

Peter Rose did not testify on his own behalf. Although he had no prior felony convictions and no history of sexual assaults, Rose's trial attorney advised him against testifying. Rose's attorney abdicated any responsibility to prepare Rose to take the witness stand, telling his client that in his view he was "too hot tempered" and would not, therefore, make a good witness.[50] Not being educated in the law and not knowing that he had the right to testify, Rose followed his lawyer's advice.

The prosecutor mocked the defense because there was no credible evidence that the other man, Dooley, was guilty. The defense theory seemed to be no more than just the oft-ridiculed

---

[46] *See supra* note 19.

[47] *See supra* notes 27-35 and accompanying text.

[48] *See* R.T., *supra* note 10, at 52.

[49] *Id.*

[50] Interview with Peter Rose (Mar. 15, 2006) (notes on file with author).

defense that Some Other Dude Did It (SODDI, as this defense is referred to disparagingly in criminal courts). In addition to putting on an inherently incredible defense that shifted the burden of proof from the prosecution, the defense attorney did the unforgivable: he essentially argued to the jury that thirteen-year-old Alicia was a sexual tease. In his closing argument, the defense attorney discussed Alicia and her testimony this way:

> You can look at demeanor. She came in here yesterday on recall . . . . What struck me is . . . as she walked to this counsel table, by [the prosecutor], to the chair in front of every one of you, the way she walked. I remember when I was in high school some of my female friends commenting upon others, using the phrase along the lines of 'boy I wish I had a swing on my back porch like that.' This lady walked just like that.
> Why is that important? We go back to the statement about this lady being up and down Hilborn Street. She . . . really did know at least who he was [referring to Dooley, the man the defense attorney argued was the guilty party]. Maybe not by name, but by sight, Mr. Dooley. She was teasing him. That is what the statements that came in were.[51]

Later in his argument, he said:

> Maybe she was flirting with this guy. Maybe she did end up down the alley with him and maybe at some point he wanted to do something that was a lot more than what she had in mind. Maybe that is when she figured out he really was serious about taking her up on this offer and things weren't pleasant after that.
> Maybe. I don't know. I wasn't there, just like you weren't there.[52]

In rebuttal, the prosecutor said:

> A little [thirteen-year-old] kid, she had the guts to climb up there and talk to you. But he wants to tell you she is . . . sashaying while she is walking by the jury. Did any of you guys notice her teasing you? Did any of you notice her in

[51] R.T., *supra* note 10, at 1031-1032.

[52] *Id.* at 1035-1036.

> tight jeans, a miracle bra? . . . It takes a lot of gall to come up with something that pathetic.

And, connecting the pathetic argument to Rose, who had not testified, the prosecutor told the jury:

> [Maybe that's the way they see her.] Because Dr. [L] told you many rapists know their victims and many rapists fantasize about their victims. Why would he [referring to the defense attorney] come up with that argument? Where would he even get that idea? His client is sitting right next to him. Nothing about [A] came across as a tease.[53]

After the jury found Rose guilty, the judge sentenced him to twenty-seven years in prison.[54] Rose wept at his sentencing. His appeals were denied. All state prison time is hard time, but for a man convicted of sexual assault of a child the time is harder: labeled a child sexual offender, Rose suffered from assaults and harassment by other prisoners. His family spent their life savings to hire an appellate attorney to file a petition for a writ of habeas corpus. The Superior Court denied the writ filed there.[55] While a second writ was pending in Federal Court, the appellate attorney contacted the Northern California Innocence Project.

F. PURE LUCK AND PERSISTENCE LEADS TO PROOF OF INNOCENCE

Students at Golden Gate University School of Law's Innocence Project began investigating Rose's case in late 2003. Unlike so many of the cases we reviewed, this was one in which we realized that DNA testing might actually prove innocence. The first hurdle to overcome was to determine if the biological evidence still existed. Students wrote letters to preserve the evidence and called San Joaquin County officials: the clerk, the crime lab, and the DA's office. No one could find the pubic hair or the other biological evidence. In fact, students were told repeatedly that all the physical evidence in the case had been de-

[53] *Id.* at 1046.

[54] *Id.* at 1159-1161.

[55] Memorandum of Points and Authorities in Support of Defendant's Motion for Appointment of Counsel and DNA Testing at 5, People v. Rose, SC058356A (Mar. 18, 2004).

stroyed.[56]

Persistence is perhaps the most important lawyering skill. When a court clerk told a student on the phone that all the evidence had been destroyed, the student called back and asked for a copy of the destruction order. Once we learned exactly which evidence had been destroyed, we realized that one piece of potentially exculpatory evidence was not on the destruction list.

While reviewing the appellate lawyer's file, a student found a copy of a pre-trial memorandum from the prosecutor to the Department of Justice ("DOJ") laboratory in Berkeley asking the DOJ criminalist to try to develop a DNA profile from a cutting from the rape victim's underwear. A report from the lab indicated that it was able to extract a semen sample from the underwear, but not to develop a DNA profile. This semen sample escaped destruction purely by accident. The evidence was never sent back to San Joaquin County and remained in a test tube at the Berkeley laboratory for nearly ten years. Had the test tube been returned to its county of origin as it should have been, it would have been destroyed along with the pubic hairs and the rest of the physical evidence in the case.

After learning that the sample was still in existence at the DOJ laboratory, we consulted with a forensic DNA expert, Brian Wraxall. Wraxall believed that, given the advances in DNA testing since Rose's trial in 1995, it might very well be possible to get a profile from that same piece of evidence using YSTR testing.[57] Students supervised by Golden Gate University Adjunct Professor Janice Brickley wrote a motion for DNA testing with a request that the testing be performed by Wrax-

[56] California Penal Code section 1417.9, enacted in 2001, mandated that all California counties maintain biological evidence in every case for the length of time that any person remains incarcerated because of that conviction. CAL. PENAL CODE § 1417.9 (West 2006). Prior to the effective date of this statute, counties routinely destroyed evidence after the appeals were completed. Most of the physical evidence in the Peter Rose case had been destroyed before Penal Code section 1417.9 took effect.

[57] Since 1995, advances in DNA testing, specifically YSTR typing, permit more definitive genetic profiling from smaller samples. When there is a mixture of male and female DNA, and the female DNA is large, it may mask the male DNA. YSTR typing circumvents this scenario, allowing only the male DNA to be typed. Any YSTR profile obtained could thus be compared to a suspect for inclusion or exclusion. Using this methodology on the semen in the test tube at the DOJ lab, Peter Rose was excluded as its donor. *See* Declaration of Brian Wraxall in support of Defendant Rose's Motion for DNA Testing, People v. Rose, No. S.C. 058356A (2004).

all's laboratory. The motion was granted in June 2004.[58] In October 2004, nearly ten years after Rose's nightmare began, that testing excluded him as the donor of the semen found on Alicia's underwear after the rape. On October 29, 2004, two weeks after the results of the DNA testing, San Joaquin County Judge Stephen Demetras granted our state court petition for a writ of habeas corpus and ordered Rose's immediate release.[59]

The next day, a Stockton Record newspaper article described the DNA exclusion and Rose's ten year odyssey toward freedom. Alicia, then twenty-three years old, read the story in the paper, called the reporter, and recanted her identification. She told Stockton Record reporter Jeff Barker: "I was never sure. The police pressured me to name someone. I only went along with them because I thought they had other evidence lined up against Rose."[60]

Two months later, on February 18, 2005, Judge Demetras granted Rose's petition for a finding of factual innocence.[61] On the same day, a local newspaper reported that the Lodi Police Department had investigated its handling of the case and found no wrongdoing.[62] As far as we know, neither the San Joaquin District Attorney's Office nor the County Conflict Criminal Defenders Program have conducted investigations into the conduct of either the prosecutor or the defense attorney.

II. LESSONS FROM THE PETER ROSE CASE

A. THE PROSECUTOR: BENDING THE TRUTH

1. Duty Not To Impede the Truth

Courts have long recognized that, as a minister of justice, a

---

[58] *See* Order Granting Motion for DNA Testing, People v. Rose, No. S.C. 058356A (June 7, 2004).

[59] Order Granting Habeas Petition and Ordering Immediate Release of Petitioner from State Prison, People v. Rose, No. S.C. 058356A (October 29, 2004).

[60] Jeffrey M. Barker, *Rape Victim Recants*, THE STOCKTON REC., Nov. 6, 2004.

[61] Orders in Support of Finding of Factual Innocence, People v. Rose No. SC058356A (Mar. 4, 2005).

[62] Layla Bohm, *Police Conclude Internal Review of Rose Case, Find No Wrongdoing,* LODI NEWS-SENTINEL, Feb. 18, 2005.

prosecutor has a special duty not to impede the truth.[63] That duty has been recognized implicitly in cases where courts have reversed convictions when the prosecutor engaged in conduct that *distorted*, *subverted*, or *suppressed* the truth.[64]

In *Berger v. United States*,[65] the seminal case defining the prosecutor's legal and ethical role as a minister of justice, the Supreme Court implied that the prosecutor's duty to serve justice includes the avoidance of conduct that deliberately corrupts the truth-finding process.[66] "It is as much his [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[67]

In recognition of the unique function of a prosecutor, the ABA Model Rules of Professional Conduct include a special standard, Model Rule 3.8, which applies only to prosecutors in criminal cases.[68] The comment to Rule 3.8 observes: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[69]

In Rose's case, when the District Attorney called the com-

---

[63] Bennett Gershman, Article, *The Prosecutor's Duty to the Truth*, 14 GEO. J. LEGAL ETHICS 309, 316-317 (2001) [hereinafter Gershman].

[64] *Id.* at 316-317 (emphasis added).

[65] Berger v. United States, 295 U.S. 78, 88 (1935).

[66] Gershman, *supra* note 63, at 317. The misconduct in *Berger* included: misstating facts during cross-examination, falsely insinuating that witnesses said things they had not said, representing that witnesses made statements to the prosecutor personally out of court when no proof of this was offered, pretending that a witness had said something that he had not said and persistently cross-examining him on that basis, and assuming prejudicial facts not in evidence. The prosecutor's closing argument contained remarks that were "intemperate," "undignified," and "misleading," including assertions of personal knowledge, allusions to unused incriminating evidence, and ridiculing of defense counsel. *Id.*

[67] *Berger,* 295 U.S. at 88.

[68] MODEL RULES OF PROF'L CONDUCT R. 3.8 (2004).

[69] MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. a (2004); *see also, APRL Panelists Examine Why Prosecutors Are Largely Ignored By Disciplinary Officials*, 78 CRIM. L. REP. 609 (2006). At a February 10, 2006 American Bar Association program, "Prosecution Ethics: Do Prosecutors Seek Justice or Merely Convictions?", sponsored by the Association of Professional Responsibility Lawyers (APRL), panel moderator James M. McCauley, ethics counsel for the Virginia State Bar, reported that "it is rare for prosecutors to face disciplinary charges even for clear violations of Rules 3.3 [requiring lawyers' candor toward tribunals] or 3.8." *Id.*

plaining witness to the stand he was vouching for her credibility, and in effect, condoning the police interrogation tactics. He must have known, from listening to the tape of her three-hour police interrogation and from talking with Alicia herself, that she had repeatedly said she never saw the man's face, that she had rejected a photo of Rose in the first photo lineup, and that the police questioning was coercive. In short, at the time he met with the young crime victim, the District Attorney knew, or should have known, that Alicia's identification of Peter Rose as her attacker was far from reliable.

Under these circumstances, the District Attorney clearly had a duty not to impede the truth by informing the jury of all of the circumstances surrounding Alicia's eventual identification of Rose. Those circumstances included the lengthy December 2004 interview with police detectives, during which Alicia repeatedly informed detectives that she was uncertain of the identity of her attacker. Despite the pressures of the police interrogation,[70] Alicia stated that "I do not know if its [sic] Pete or not."[71] After listening to the tape of this interrogation and personally interviewing her, the District Attorney had to have been aware of the uncertainty of her identification of Rose. This uncertainty, coupled with her inability to pick Rose out of the first photo line-up, should have alerted the prosecutor to the unreliability of Alicia's identification of Rose as her attacker. Although Alicia remained uncertain of her identification of Rose while talking with police, at trial she testified to one hundred percent certainty that Rose was her attacker. The fact that this testimony came after Alicia met with the prosecutor raises serious questions regarding the ethics of the prosecutor's own interviewing techniques. Putting Alicia on the stand with full knowledge of her uncertainty and failing to elicit evidence of her prior inconsistent statements violated the District Attorney's legal and ethical duties.[72]

---

[70] *See supra* notes 14-26 for examples of the police coercion.

[71] *See supra* note 23 and accompanying text.

[72] *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 (a-d) (2004). ABA Rule 3.8 states, in relevant part: "The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel; (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing; (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to

2. Knowing Use of Inaccurate Evidence

The principle that the prosecution may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness.[73] The state violates a criminal defendant's right to due process of law when, although not soliciting false evidence, it allows false evidence to go uncorrected when it appears.[74] In *Hayes v. Brown*, Assistant District Attorney Terence Van Oss presented false evidence and misled the judge, jury, and opposing counsel, in a successful effort to enhance the credibility of the key prosecution witness by engaging in the following forbidden acts: (1) before the Hayes trial, the State had made a deal with James's (prosecution's key witness) attorney for the dismissal of pending felony charges after his testimony; (2) the State specifically represented to the trial judge that there was no such deal; (3) the State elicited sworn testimony from James at trial that there was no such deal, both on direct and re-direct examination; and (4) the State failed to correct the record at trial to reflect the truth.[75] Mr. Hayes was convicted and sentenced to death.[76] The prosecutor's wrongful behavior in *Hayes* illustrates one of the many ways that prosecutorial misconduct can lead to wrongful convictions. The prosecutor's conduct in Peter Rose's case, allowing Alicia's false identification testimony to go to the jury without presenting evidence of her prior inconsistent statements, is another.

a. The Accuracy of the Testimony of Ron White

The District Attorney should have known from hearing the

negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal."

[73] Napue v. Illinois, 360 U.S. 264, 269 (1959).

[74] Hayes v. Brown, 399 F.3d 972, 978 (9th Cir. 2005).

[75] *Id.* at 976-978, 985-988.

[76] *Hayes*, 399 F.3d at 988 ("Our criminal justice system depends on the integrity of the attorneys who present their cases to the jury. When even a single conviction is obtained through perjurious or deceptive means, the entire foundation of our system of justice is weakened.").

tape or reading the transcript of Alicia's interrogation that Ron White had not seen the rapist because Alicia told police quite plainly that the man she pointed out to White was just "some guy walkin'."[77] Therefore, White was not a witness to anything relevant. Without White's "corroborating" identification testimony, Alicia's identification should have been viewed with even greater skepticism.

Even though by the time of trial Alicia had reverted to the statement that the man she pointed out to White on the street was both the rapist and Rose, in light of the defense attorney's failure to elicit Alicia's prior inconsistent statements to the police on this point, the prosecutor had a duty to do so. Even if the District Attorney believed that her prior statement was born of confusion, he had an ethical duty to let the jury know that on a prior occasion the witness had told the police something different than her present testimony. This ethical duty on the part of the prosecutor exists whether the defense attorney elicited the testimony or not.

b. The Benefits White Received for His Testimony

The District Attorney masked the extent of the benefits Ron White received after his testimony. The fact that a potential three strikes prosecution was reduced and diversion was granted *after* White's favorable testimony for the prosecution shows a motive to explain why White became more certain in his identification over time. Although the prosecutor did not exactly keep these facts from the jury, he called a witness, another Deputy District Attorney, to testify that White's testimony in the Rose case did not influence the office's decision to give him diversion.

3. Duty Regarding Expert Witnesses

If the prosecution becomes aware of information that casts doubt on the accuracy of the testimony of one of its expert witnesses, it must disclose that evidence if it is material.[78] In

[77] T.I., *supra* note 12, at 74.

[78] *See* Giles v. Maryland, 386 U.S. 66, 74 (1976) (plurality opinion) (citing Napue v. Illinois, 360 U.S. 264, 269 (1959)). In *Giles* two brothers were convicted of raping a sixteen-year-old girl. *Id.* A third brother was convicted for the same conduct in a separate trial. *Id.* at 68 n.2. At trial the two defendants testified that the victim had not

Rose's case, the prosecutor failed to inform the jury that the semen sample had a blood type that was different than Rose's.[79] Had he done so, the prosecution's expert witness could then have testified regarding her conclusion that the results were "inconclusive." Permitting the experts to explain why she did not think that the absence of his blood type excluded Rose would have at least made the jury aware of this material fact and allowed them to decide for themselves if they believed the expert's explanation. By testifying that the results of the blood test were "inconclusive," the expert left the jury with the erroneous impression that she was unable to get a blood type from the sample. These issues raise the question of whether the District Attorney has an ethical obligation to make the jury aware of potentially exonerating facts when the defense attorney, due to incompetence, does not elicit those facts himself.

4. Disclosure Duties

The prosecution's failure to disclose favorable information to the defense constitutes a violation of the defendant's constitutional rights only if, and to the extent that, it deprives the defendant of a fundamentally fair trial.[80] To meet this burden, the defendant must show that the undisclosed information was material to guilt or to punishment.[81]

California Penal Code section 1054.1 delineates explicit prosecutorial disclosure duties.[82] Section (e) specifically im-

only consented but had in fact invited the act and that she informed them of numerous previous such acts. *Id.* at 69-70. The evidence allegedly suppressed was: (1) a similar complaint of rape which occurred between the event involved and the trial, which charges were later withdrawn by the girl, and admissions by her to police that she had previously had relations with numerous boys and men, many of whom she did not know; (2) a formal recommendation by a social worker of probation for the girl because she was beyond parental control; (3) a hearing resulting in commitment of the girl by juvenile authorities for "protective custody" because of harassment by young men and a suicide attempt. *Id.* at 70-71. The Supreme Court remanded the case to the state court for further proceedings to determine whether a new trial was required based on the Supreme Court's direction. *Id.* at 82.

[79] R.T., *supra* note 10, at 1018-1019.

[80] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[81] *Id.*

[82] CAL. PENAL CODE § 1054.1 (West 2006) ("The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies: (a) The names and ad-

poses upon a prosecutor the duty to disclose "*any* exculpatory evidence."[83] Likewise, section (f) imposes the duty to disclose "relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts."[84] The plain language of the statute imposes a duty on the prosecution to turn over any and all exculpatory evidence, including notes compiled by the prosecution's expert witness containing exculpatory information.

This duty exists regardless of whether there has been a request for such evidence, and irrespective of whether the suppression was intentional or inadvertent.[85] The prosecutor's intentional or negligent suppression of material evidence favorable to the accused denies the defendant a fair trial and requires reversal.[86]

Although Rose's defense attorney apparently never specifically requested discovery of the bench notes made by the testifying criminalist, the prosecutor was under a professional and ethical responsibility to turn them over anyway because they contained exculpatory information. By failing to provide those notes to the defense, the District Attorney kept relevant and potentially exculpatory evidence not only from the defense, but also from the jury. If a criminal prosecution is a search for truth, the District Attorney should have a duty to tell the jury

dresses of persons the prosecutor intends to call as witnesses at trial. (b) Statements of all defendants. (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged. (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial. (e) Any exculpatory evidence. (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.")

[83] *Id.* (emphasis added).

[84] *Id.*

[85] Izazaga v. Superior Court, 54 Cal. 3d 356, 378 (1991).

[86] *See, e.g.,* People v. Rutherford, 14 Cal. 3d 399, 406-07 (1975) (overruled on other grounds) (holding that suppression of substantial material evidence, bearing on the credibility of the key prosecution witness, is a denial of due process within the meaning of the Fourteenth Amendment); *see also* Hayes v. Brown, 399 F.3d 972, 984 (9th Cir. 2005) (In assessing materiality of false testimony presented by the state at a criminal trial, the Court of Appeals "determine[s] whether there is 'any reasonable likelihood that the false testimony could have affected the judgment of the jury'; if so, then 'the conviction must be set aside.'") (quoting Belmontes v. Woodford, 350 F.3d 861, 881 (9th Cir. 2003)).

that the expert's testing reveals that the defendant's blood type is absent from the semen sample taken from the rape victim.

In this case, the District Attorney failed to turn over the notes that revealed Rose's blood type was different from that of the victim. The District Attorney then proffered the criminalist's testimony that the results were "inconclusive." This conduct, offering testimony that the serology tests were inconclusive, while failing to disclose the fact that Rose's blood type was not present in the sample, is indistinguishable from the forbidden "knowing proffer of false testimony."[87]

5. Inadmissible Evidence

Under ABA Model Rules of Professional Conduct Rule 3.8, entitled "Special Responsibilities of a Prosecutor," and the similar mandate of Rule 103(c) of the Federal Rules of Evidence, prosecutors act imprudently when they jeopardize a possible conviction by cunningly attempting to place otherwise inadmissible evidence before the jury.[88]

Rose's live-in girlfriend was called as a prosecution witness at trial, and the District Attorney elicited information from her that Rose had hit her and was often drunk.[89] The defense failed to object. The prosecutor then sought to elicit the witness' speculation regarding Rose's drug use.[90] All of this evidence was both prejudicial and monumentally irrelevant on the issue of Rose's identity as the rapist. With a proper objection, the evidence should have been excluded. In addition, the prosecutor was permitted to ask the defendant's girlfriend whether or not she thought Rose committed the crime.[91] There was no objection to this call for improper and prejudicial specu-

[87] Napue v. Illinois, 360 U.S. 264, 269 (1959).

[88] MODEL CODE OF PROF'L CONDUCT R. 3.8; *and* FED R. EVID. 103(c) ("In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury."); *see also* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-106(C)(7) (1981) ("In appearing in his professional capacity before a tribunal, a lawyer shall not . . . [i]ntentionally or habitually violate any established rule of procedure or of evidence."); *see also* United States v. Schindler, 614 F.2d 227, 228 (1980) (discussing the Model Code and the Federal Rules of Evidence).

[89] R.T., *supra* note 10, at 393.

[90] *Id.* at 393-396.

[91] *Id.* at 400, 541, 623-24.

lation. When the prosecutor asked this clearly objectionable question of Rose's girlfriend, her answer was "no."[92] He was then permitted to impeach her denial with earlier hearsay statements in which she said she wondered if it was Rose who had raped Alicia and also said "I wouldn't doubt it if he did it."[93] Any probative value of the girlfriend's speculation regarding whether Rose committed the crime and her opinion of his character was completely outweighed by the prejudice of these statements and should have been excluded from the trial. The prosecutor's conduct raises the question of whether a District Attorney has a right to take advantage of a trial attorney's failure to object to clearly inadmissible character evidence.

B. THE DEFENSE ATTORNEY: ERRORS AND OMISSIONS

A criminal defendant's right to counsel in judicial proceedings is protected by the federal and California constitutions, as well as a host of state statutes.[94] Specifically, the Sixth Amendment of the federal Constitution provides that in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his or her defense.[95] This right entitles a criminal defendant to secure counsel of his or her own choosing, and if he or she is unable to afford it, to the appointment of counsel. The right to counsel is among the most sacred and sensitive of all constitutional rights mainly because it serves to protect the unaided layperson during critical confrontations with his or her expert adversary, the government, after the adverse positions of government and the defendant have solidified with respect to a particular alleged crime.

1. "Counsel" Under the Sixth Amendment

"Courts unwaveringly adhere to the view that 'counsel' under the Sixth Amendment includes *any* duly licensed attorney."[96] According to at least one commentator, a narrower con-

[92] *Id.* at 541.

[93] *Id.* at 416, 598, 623-24.

[94] *See, e.g.,* U.S. CONST. amend. VI; CAL. PENAL CODE §§ 686, 858, 987 (West 2006).

[95] U.S. CONST. amend. VI.

[96] Bruce A. Green, *Legal Fiction: The Meaning Of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433 (1993) (emphasis added).

struction of the constitutional term is warranted. Bruce Green argues that "counsel" under the Sixth Amendment should include only those attorneys who are qualified to render legal assistance to a person accused of a crime.[97] If one were to accept Green's suggestion that the Sixth Amendment requires more than a mere license, then many people, in addition to Rose, who have been tried and convicted with an unqualified attorney by their side, have been deprived of their right to "counsel." Looking at Rose's attorney's performance in this case, one has to question his qualifications to represent criminal defendants. Yet Rose's defense attorney is an experienced member of the State Bar, and at the time this article went to press, still practicing in San Joaquin county.[98]

2. Ineffective Assistance of Counsel

To demonstrate ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that the deficient performance prejudiced his defense.[99] Deficient performance is demonstrated when "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[100] Prejudice is established if there is a reasonable probability that but for the counsel's error, the result of the proceeding would have been different.[101]

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."[102] These norms are reflected in American Bar Association ("ABA") standards.[103] The ABA standards state that a defense attorney's "investigation should always include efforts to secure information in the possession of the prosecution and law en-

[97] *Id.*

[98] State Bar of CA: Harry Edward Hudson, Jr., *at* http://members.calbar.ca.gov/search/member_detail.aspx?x=114512 (last visited Aug. 10, 2006).

[99] Strickland v. Washington, 466 U.S. 668, 687 (1984).

[100] *Id.*

[101] *Id.* at 694.

[102] *Id.* at 688.

[103] STANDARDS OF CRIMINAL JUSTICE 4-4.1 (1993), *available at* http://www.abanet.org/crimjust/standards/dfunc_blk.html#4.1 (last visited Aug. 10, 2006).

forcement authorities."[104]

3. Errors and Omissions

Peter Rose's attorney made the following serious omissions and errors:

> (a) Failure to seek discovery of bench notes and to consult an expert to explain the significance of the information contained in the notes. Rose's defense attorney did consult an expert, but because he was unaware that his client's blood type was not found in the semen sample, he failed to provide the expert with complete information about the serology testing, and thus the expert's opinion was useless.
> (b) Failure to cross-examine the criminalist to elicit the fact that Rose's blood type was not present in the semen sample found on the victim's underwear.
> (c) Failure to proffer defense expert testimony to contradict the criminalist's opinion that the serology evidence was "inconclusive."
> (d) Failure to move to suppress in-court identification testimony of both complaining witness and alleged eyewitness.[105]
> (e) Failure to properly cross-examine the complaining witness and alleged eyewitness.
>
> > 1. Regarding the complaining witness, the attorney failed to use impeachment material available in complaining witness' tape-recorded statements to police.
> > 2. Regarding the alleged eyewitness, the attorney similarly failed to file a motion to suppress, and also failed to seek complete information regarding promises made to witness regarding pending criminal case.
>
> (f) Failure to respect his client's autonomy regarding the decision to testify. Instead, Rose's attorney counseled his client, who had no prior sex offenses and no prior felony convictions, that it would "not be a good idea" for him to testify.
> (g) Last, but certainly not least, the defense attorney gave a

[104] *Id.*

[105] *See, e.g.,* People v. Ledesma, 233 Cal. Rptr. 404, 440 (1987) (finding that the defense attorney's failure to move to suppress evidence of a telephone call that was intercepted at defendant's residence by a police officer who had entered the premises without a warrantamounted to ineffective assistance of counsel.

closing argument offensive to the mores of the community.[106]

III. WHEN DUE PROCESS FALLS SHORT

A. NO PROTECTION FROM PROSECUTORIAL MISCONDUCT

Looking at the DNA exonerations, we can see patterns: in nearly eighty percent of the cases studied by the New York Innocence Project, mistaken eyewitness identification contributed to the wrongful conviction.[107] Prosecutorial misconduct was a factor in forty-five percent of those cases. And, in twenty-five percent of those cases, the specific type of prosecutorial misconduct that contributed to a wrongful conviction was the knowing use of false testimony.[108]

Lofty sentiments about justice and the role of lawyers expressed in appellate opinions are clearly insufficient to protect the innocent. *Berger* was decided in 1937; *Brady* was decided in 1969, and *Hayes* in 2005.[109] Yet despite several decades of jurisprudence defining and decrying prosecutorial misconduct, Rose's case is one of the many illustrations of ongoing prosecutorial misconduct, unconstrained by prior court decisions.

A professional, experienced deputy district attorney in the San Joaquin County District Attorney's office prosecuted the Peter Rose case. The fact that Rose was subsequently exonerated did not lead to a public investigation of the prosecutor's

---

[106] *See* Shaff v. Baldwin, 107 Cal. App. 2d 81, 86 (1951). The court held that arguing facts not justified by the record is a serious error and to suggest that the jury could speculate, was misconduct, especially when uncalled for and deliberate. Further, this conduct is directly in violation of Rules of Professional Conduct of the State Bar of California, Rule 5-200 (B), which states, in part: "In presenting a matter to a tribunal, a member: . . . (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law . . . ." CAL. RULES OF PROF'L CONDUCT 5-200 (B) (West 2006).

[107] The Innocence Project, http://www.innocenceproject.org/docs/Eyewitness_Testimony_Ann_Rev.pdf (last visited Aug. 10, 2006).

[108] *See* The Innocence Project, Police and Prosecutorial Misconduct, http://innocenceproject.org/causes/policemisconduct.php (last visited Aug. 10, 2006).

[109] Although, in reversing Hayes conviction, the court found the prosecutor's conduct reprehensible, Mr. Hayes' prosecutor, Terrence Van Oss, is now a Superior Court Judge in the same county where he lied to the judge and jury in Hayes. *See also* Lynn Damiano, Note, *Taking a Closer Look at Prosecutorial Misconduct: The Ninth Circuit's Materiality Analysis in Hayes v. Brown and Its Implications for Wrongful Convictions,* 37 GOLDEN GATE U. L. REV. 191 (2006).

conduct. Today, a dozen years after Rose's wrongful conviction, the prosecutor still works for the San Joaquin District Attorney's Office.[110]

B. INSUFFICIENT PROTECTION AGAINST INADEQUATE DEFENSE COUNSEL

According to the Innocence Project analysis of DNA exonerations, incompetent defense lawyering was a contributing factor in thirty-two percent of the cases.[111] Mirroring prosecutorial misconduct, ineffective or incompetent defense counsel have allowed men and women who might otherwise have been proven innocent at trial to be sent to prison. Failure to investigate, failure to call witnesses, and inability to prepare for trial due to caseload or incompetence, are a few examples of poor lawyering. The shrinking funding and access to resources for public defenders and court appointed attorneys is only exacerbating the problem.[112]

Peter Rose was represented by a defense attorney appointed by the court. His family hired an appellate lawyer who raised defense counsel's errors and omissions in an ineffective assistance of counsel claim on appeal. The Sixth District Court of Appeal rejected these claims. The court found no prejudicial error and affirmed Rose's conviction. Prior to the entry of the Innocence Project into the case, the San Joaquin Superior Court rejected Rose's petition for writ of habeas corpus on the same grounds of ineffective assistance of counsel that appellate counsel had raised on appeal. Clearly in this case, the minimal "due process" afforded by the courts was not enough to prevent an innocent man from wrongful conviction.

Yet, like the prosecutor in Peter Rose's case, the defense

---

[110] State Bar of California: Kevin Mayo, *at* http://members.calbar.ca.gov/search/member_detail.aspx?x=119380 (last visited Aug. 10, 2006).

[111] The Innocence Project, http://www.innocenceproject.org (last visited Aug. 10, 2006).

[112] The ACLU has filed a class action lawsuit against the indigent defense system against seven counties in Montana - Butte/Silver Bow, Teton, Flathead, Glacier, Lake, and Ravalli - as well as the governor's office for failing to meet the national standards of indigent defense. The suit spotlights the need to enforce standards and improve resources for attorneys representing the indigent. *See* Nat'l Legal Aid & Defender Ass'n, *An Assessment of Indigent Defense Services in Montana,* at 6 (Aug. 4, 2004), *available at* http://www.aclu.org/FilesPDFs/martz_assessment.pdf (last visited Aug. 23, 2006).

attorney has suffered no adverse consequences from his role in this miscarriage of justice. He continues to be a licensed member of the State Bar.[113]

IV. POLICY SUGGESTIONS

> The authentic majesty in our Constitution derives in large measure from the rule of law—principle and process instead of person. . . . Nowhere in the Constitution or in the Declaration of Independence, nor for that matter in the Federalist or in any other writing of the Founding Fathers, can one find a single utterance that could justify a decision by any oath-beholden servant of the law to look the other way when confronted by the real possibility of being complicit in the wrongful use of false evidence to secure a conviction in court.[114]

The law has proven unsuccessful in protecting the innocent against prosecutorial misconduct, as well as insufficient defense counsel. To the extent that the problem of inadequate defense lawyering is caused by insufficient resources, some policy changes that would help alleviate the problem include:

> (1) Ensuring adequate pay for public defenders and competitive fees for court appointed attorneys would attract competent attorneys to staff these offices and take cases. Public defenders and prosecutors in any given area should receive commensurate pay.
> (2) Caseloads for public defenders should never exceed the standards of the National Legal Aid and Defenders Association. If attorneys are forced to proceed with too many cases, ethical complaints should be lodged with the appropriate state bar.
> (3) Every jurisdiction should establish standards of adequate defense. The public should be informed and educated about the requirements of an adequate defense. Standards would also provide notice to all defense attorneys of how much work is expected of them.
> (4) Federal funds for defense services should be relative to the amount of funding provided to prosecutors' offices in any

[113] State Bar of California: Harry Hudson, *at* http://members.calbar.ca.gov/search/member_detail.aspx?x=119380 (last visited Aug. 10, 2006).

[114] N. Mariana Islands v. Bowie, 236 F.3d 1083, 1096 (9th Cir. 2001).

given jurisdiction.

V. CONCLUSION

What will cause a change in the behavior of police, public prosecutors and those who represent the indigent? The recent work of Professor Ellen Yaroshefsky, Executive Director of Cardozo Law School's Jacob Burns Ethics Center in New York, suggests some answers.[115] The key is finding ways to hold individuals accountable. Yaroshefsky proposes sanctioning offending prosecutors and incompetent defense attorneys, and making that process transparent so that the public can see that lawyers who violate the public trust and/or the trust of their clients are not above the law.

There are models: following the example of the criminal case review commission in England,[116] and the public inquiry model in Canada,[117] some states have begun to create Innocence Commissions specifically designed to determine what factors led to guilty verdicts in the post-conviction exoneration cases and to implement reforms. Some of those include:

> (1) Transforming eyewitness identification procedures. Mistaken eye-witness identification is the single most common cause of conviction of the innocent. Certain systemic changes, based on two decades of comprehensive social science research, are becoming accepted.
> (2) Addressing the problem of false confessions: a factor in twenty-two percent of post-conviction DNA exonerations. Videotaping police interrogations—a powerful tool to protect the innocent and also to protect police from unwarranted accusations of coercion. This approach was adopted by Illinois after former Governor Ryan declared a moratorium on capital punishment in that state.
> (3) Investigations into unreliable forensic science and improperly operated laboratories.

---

[115] *See* Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC L. REV. 275 (2004).

[116] The Criminal Cases Review Commission, http://www.ccrc.gov.uk/about.htm (last visited Aug. 10, 2006).

[117] Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin, Executive Summary & Recommendations (1998), *available at* http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin_esumm.pdf (last visited Aug. 10, 2006).

(4) Reform the overuse of unreliable informant testimony by jailhouse informants.
(5) The creation of an Innocence Commission, a blue ribbon panel made up of highly regarded professionals charged with the responsibility to conduct objective investigations, and invested with the authority to issue public reports and impose sanctions. The creation of such a Commission would be recognition of the fact that the existing disciplinary system for attorneys has not been a workable model for either the regulation of unethical prosecutors or incompetent defense attorneys. An open process is needed, unlike state bar investigative systems, which operate in secret.

An Innocence Commission could do the following:

(1) Develop protocols for the post mortem of each wrongful conviction where there are allegations of prosecutorial misconduct and/or incompetent defense.
(2) Examine post conviction wrongful conviction cases and make recommendations for change to deter future prosecutorial misconduct and incompetent defense.
(3) Develop clear and enforceable discovery standards for prosecutors and work with courts legislatures and bar associations of each state to insure those standards are implemented.
(4) Establish systems of investigation and discovery that maintain minimum secrecy.
(5) Develop a database of wrongful conviction cases available to the public.
(6) Assist in the development of educational programs for the bench and bar about the necessity to report ethical violations.
(7) Evaluate changes to the code of judicial conduct.

One hundred and eighty-three DNA exonerations over a period of less than twenty years make it difficult, if not impossible, to pretend that our current system of justice is foolproof.[118] We cannot afford to continue to ignore the underlying causes of wrongful conviction. All of these wrongfully convicted criminal defendants lost years of their lives to injustice. The impact on their families and communities is incalculable.

Yet each exoneree is a person who was charged and tried

[118] The Innocence Project, http://www.innocenceproject.org (last visited Aug. 10, 2006).

by professional prosecutors and represented by licensed members of the bar. Their trials were presided over by judges of our Superior Courts, their verdicts were rendered by duly impaneled jurors, judgment was imposed and their convictions were affirmed by appellate courts, and yet years, sometimes decades, later new evidence provided scientific proof that these protections were insufficient to prevent terrible miscarriages of justice.

Implementing dramatic changes in the way we conduct ourselves as criminal justice professionals: police, prosecutors and defense attorneys, is not just about protecting the innocent. It is about public confidence in the integrity of the criminal justice system. The needless suffering that Peter Rose and the other DNA exonerees endured should prompt us to take steps to restore that confidence. Establishing Innocence Commissions in every jurisdiction is a first step toward achieving that goal.